IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 796

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.
UNITED STATES REALTY AND IMPROVEMENT COMPANY.

BRIEF OF UNITED STATES REALTY AND IMPROVEMENT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinions Below

The decision of the Circuit Court of Appeals was handed down January 15, 1940 and was filed February 2, 1940. It is reported at 108 F. (2d) 794, and is also contained in the record (R. 420).

The District Court orders (R. 142, 149, 151) from which the appeals were taken to the Circuit Court of Appeals, were entered July 28, 1939 and are unreported. These orders were in effect formal entries of the District Court rulings expressed orally in open court on July 27, 1939 (R. 336-339).

The Questions Presented

It is submitted that the sole issues presented are as follows:

1. Must a District Court refuse to assume jurisdiction over a proceeding for an arrangement under Chapter XI of the Bankruptcy Act, solely because the debtor is a corporation which has securities outstanding in the hands of the public?

2. May the Securities and Exchange Commission be permitted by the District Court to intervene in a Chapter XI proceeding?

3. Irrespective of the answer to question 2, may the Securities and Exchange Commission appeal from orders of the District Court denying the Commission's motion to dismiss the proceeding?[1]

Petitioner's question 2 (Petition, p. 2) relating to the fairness, equitability and feasibility of the proposed arrangement is not properly in issue at this time, and was not in issue in the Circuit Court of Appeals, inasmuch as that question can be raised on appeal only after the District Court has itself considered the matter. The District Court has not yet confirmed or disaffirmed the arrangement, which has now been amended, and as amended meets many of the Commission's arguments with respect thereto.

The Statutes Involved

The questions presented on this petition involve primarily Chapters X and XI of the Bankruptcy Act (Sections 101-399; Title 11 U. S. C. Secs. 501-799). Petitioner states (Petition, p. 3) that copies of Chapters X and XI have been filed in their entirety with the Clerk of this

[1] The order of the District Court referring the proceeding to a referee, although technically appealed from, is not really in issue. It seems clear that if the District Court properly assumed jurisdiction of this Chapter XI proceeding, the order of reference was proper. Section 331 of the Bankruptcy Act.

Court, and the Debtor has taken the liberty of referring to such statutes as so filed. Citations ~~of sections~~ of the Bankruptcy Act herein are, unless otherwise indicated, under the numbering in the Act as adopted rather than under the numbering in the United States Code.

Statement of the Case

This is a proceeding instituted by the Debtor on May 31, 1939 for an arrangement under Chapter XI of the Bankruptcy Act, which is now pending in the United States District Court for the Southern District of New York. The Debtor is a New Jersey corporation engaged in the business of owning and operating real estate, with substantial assets and liabilities, and with stock publicly held and listed on the New York Stock Exchange (R. 6, 7, 134).

The factual background of the proceeding may be set forth briefly as follows:

On June 1, 1919, the Debtor's subsidiary, Trinity Buildings Corporation of New York (hereinafter sometimes referred to as Trinity) executed and delivered to Guaranty Trust Company of New York its bond in the amount of $7,000,000 maturing June 1, 1939, and as security therefor executed and delivered to said Trust Company as Mortgagee its first mortgage covering two New York City office buildings (R. 7, 30). Share certificates in the bond and mortgage were issued by the Mortgagee, and the Debtor executed and delivered to the Mortgagee its guarantee of the principal, interest and sinking fund payments due under said bond and mortgage (R. 7). Although the bond and mortgage were secured, the guarantee was and is a wholly unsecured obligation. The share certificates were sold to the public, and the principal amount thereof outstanding has been reduced to $3,710,500 by operation of the sinking fund (R. 7).

With the impending maturity of the aforesaid bond and mortgage and guarantee, the Debtor proposed to holders of the share certificates a Modification Plan and

Arrangement, dated March 15, 1939, and subsequently proposed an Amended Modification Plan and Arrangement dated May 1, 1939 (R. 9).

On May 31, 1939 the Debtor filed with the United States District Court for the Southern District of New York its petition for an arrangement under Chapter XI of the Bankruptcy Act (R. 6), and proposed as an arrangement under Section 322 of Chapter XI the aforesaid Amended Modification Plan and Arrangement dated May 1, 1939 (annexed to the Petition as Exhibit B, R. 30-63). The arrangement provided for a modification and extension of the Debtor's above mentioned unsecured guarantee of the bond and mortgage of Trinity maturing June 1, 1939 and for the payment by the Debtor of all of its other debts, secured and unsecured, as they matured (R. 8, 9).

Thus, the proposed arrangement affected only unsecured indebtedness of the Debtor.

The subsequent progress of the proceeding through the decision of the court below, as shown by the various material orders and petitions, motions and other pleadings, is set forth in the record, and a summary thereof is contained in the record (Statement Under Rule 13, R. 1-5).

The proceeding is now pending before a Referee. The Debtor has submitted and the Referee has had hearings on, certain modifications of the proposed arrangement, which as modified has been held by the Referee to be fair and equitable and for the best interests of creditors.[2]

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[2] The Debtor does not believe factual arguments made by the Commission are relevant; however, it is necessary to deny the repeated references to a purported insolvency of the Debtor, occurring both in the Commission's petition and Judge Clark's opinion. This is not the case as is clearly illustrated by the record. The Debtor is solvent and allegations to the contrary are based on taking into account the Debtor's guarantee as a liability without considering the value of the mortgaged property (the Trinity Buildings) as an asset.

Therefore all arguments based on the doctrine of *Case* v. *Los Angeles Lumber Products Co. Ltd.*, 308 U. S. 106 (Nov. 6, 1939) are irrelevant. Furthermore, it is submitted that the doctrine of that case does not apply to a Chapter XI proceeding.

ARGUMENT

Summary of Reasons Urged by Debtor for Not Granting the Writ.

The substantive question of jurisdiction has been decided by the court below in accordance with the exact and clear language of the statute, and the principle of statutory construction adopted by the court below is in accordance with principles enunciated by this Court on many occasions.

The procedural questions of the Commission's right to intervene and appeal which have been raised by petitioner are academic, since petitioner has achieved its purpose of having the substantive jurisdictional question considered on the merits both by the District Court and the Circuit Court of Appeals.

I. UNDER THE EXPRESS TERMS OF THE STATUTE, ANY CORPORATION WHICH CAN BECOME A BANKRUPT MAY PROPOSE AN ARRANGEMENT UNDER CHAPTER XI.

There is no ambiguity whatever in the jurisdictional requirements set forth in Chapter XI.

Section 306(3) defines a "debtor" as any person who could become a bankrupt, and Section 306(1) defines an "arrangement" as a plan of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts upon any terms. Section 1(23) provides that "persons" shall include corporations, and Section 4 provides that any person except a municipal, railroad, insurance, or banking corporation or a building and loan association may become a bankrupt.

Sections 322 and 323 authorize a debtor wishing to effect an arrangement to file a petition setting forth the proposed arrangement. The arrangement must modify or alter the rights of unsecured creditors generally or of some class of them (Section 356).

That the Debtor is entitled, under Section 4 of the

Bankruptcy Act, to become a bankrupt, has not been questioned and is not open to argument. Accordingly, petitioner admits that the statute, read "literally", permitted the Debtor to proceed under Chapter XI (Petition, p. 9).

As for the authorities, the decision below is one of first impression in the Circuit Courts of Appeals. The only square holding by a District Court other than in this proceeding was in accord with the decision below. *In re Credit Service, Inc.*, 30 F. Supp. 878 (D. Ct. D. Md. 1940). Another District Court in a dictum expressed contrary views, which might be said to support the contention of the Commission. *In re Reo Motor Car Co.*, 30 F. Supp. 785 (D. Ct. E. D. Mich. 1939).

A. Where a statute is clear and unambiguous, the courts may not enlarge or modify its meaning by construction.

In the words of Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U. S. 79 at p. 83 (November 6, 1939):

> "* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."

This Court has generally refused to depart from the exact wording of an unambiguous statute. *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269 (1929); *Iselin* v. *United States*, 270 U. S. 245 (1926); *Wallace* v. *Cutten*, 298 U. S. 229 (1936). This has even been done in cases imposing a tax or a penal liability. *Helvering* v. *City Bank Farmers Trust Company, Trustee*,

296 U. S. 85 (1935); *Osaka Shosen Line* v. *United States*, 300 U. S. 98, 101 (1937).

The Commission argues that, if Chapter XI is not construed so as to exclude publicly owned corporations from acting thereunder, the public protection safeguards of Chapter X will be ineffective and meaningless. However, this type of argument has been rejected by this Court where the statute "expresses an intention reasonably intelligible and plain." *Thompson* v. *United States*, 246 U. S. 547 (1918). It is not for the courts through judicial decision but for Congress through legislation to express public policy.

This Court, under the foregoing general principle, has disregarded statements in Committee Reports when it deemed the statute clearly contrary to such statements. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *Helvering* v. *City Bank Farmers Trust Company, Trustee*, 296 U. S. 85 (1935). Of course, in the instant case, as will be shown briefly hereafter, there is no evidence of any Congressional intent that Chapter XI should be read otherwise than in accordance with its literal terms.

B. In any event, there is no evidence, either from the historical derivation of Chapter XI, or in Committee Reports or proceedings, of any Congressional intent to preclude corporations with publicly held securities from proceeding under Chapter XI.

The Historical Derivation of Chapter XI.

Chapter XI is derived in part from former Section 12 of the Bankruptcy Act, which was the old composition section. Section 12, although unquestionably used principally by individuals (and partnerships) was available to corporations, and in fact it was actually used by corporations. See cases cited under former Section 12 (11 U. S. C. A. Sec. 30).

Furthermore, in at least two of the corporate cases compositions were effected in respect of indebtedness which was held by the public. Thus, in *In re Realty Associates Securities Corp.* (citations *infra*) a large corporation (total creditors' claims of more than $12,000,000) made a composition in respect of bonded indebtedness which was held by over 3,000 bondholders. No question was raised as to the validity of the corporation's acting under Section 12, although problems arising in this composition were twice before the Circuit Court of Appeals for the Second Circuit and twice before the Supreme Court. *In re Realty Associates Securities Corp.*, 69 F. (2d) 41 (C. C. A.-2d, 1934), cert. den. 292 U. S. 628 (1934). The same composition was also considered in 6 F. Supp. 549 which was modified in 74 F. (2d) 6 but confirmed in 295 U. S. 295 (1935). See also *In re O'Gara Coal Co.*, 260 Fed. 742 (C. C. A.-7th, 1919).

The derivation of Chapter XI from Section 12 indicates that Congress intended to make Chapter XI available to the same types of corporations which could formerly act under Section 12. Chapter XI is a proceeding for a composition or settlement; Chapter X for a complete reorganization. The Debtor's proposed arrangement is a composition, and is strikingly similar to that effected in the *Realty Associates* case.

The derivation of Chapter XI from former Section 12 also shows that an arrangement (composition) need not disturb ownership of the equity interest (stock ownership). Section 12 compositions always contemplated that the equity interests should retain their position.

The Congressional Proceedings.

The question of *limiting* the application of Chapter XI to small, closely held corporations does not appear to have been discussed in the entire legislative history of the Chandler Act.

The only statement in the Committee Reports is that on page 51 of the House Report[3]:

> "The inclusion of corporations (in Chapter XI) will *permit* a large number of the smaller companies such as are now seeking relief under Section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12." (The Senate Report[4] refers generally to the House Report, but does not otherwise contain any statement whatever on the point.)

This quotation is revealing in showing (1) that the Committees had in mind primarily the fact of *permitting* small companies to come under Chapter XI and not the matter of *excluding* other companies, and (2) that one of the primary reasons for Chapter XI was to relieve the burden of courts hearing unnecessary 77B (Chapter X) proceedings. Such reasons are entirely compatible with permitting large, publicly owned corporations also to take advantage of the composition provisions of Chapter XI. In fact, the Bankruptcy Act expressly provides that Chapter X is not available to a debtor in cases where Chapter XI is available. Section 130(7).

In addition, whereas in Chapter X, careful standards of size are set up for the application of certain provisions thereof, no such standards appear in Chapter XI. It would be impossible for the courts to set up such standards without infringing on the legislative field of Congress.

The Commission participated actively in the preparation of the 1938 amendments of the Bankruptcy Act, containing as new Chapters, both X and XI; if it had at the time been intended that Chapter XI be unavailable in the instant type of situation, it would have been a simple matter, *with the necessary consent of Congress*, to include such a restriction in the statute.

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[3] H. Rept. No. 1409 on H. R. 8046, 75th Cong., 1st Session.
[4] S. Rept. No. 1916 on H. R. 8046, 75th Cong., 1st Session.

C. There is no public interest requiring the construction of Chapter XI urged by petitioner.

For many years, judicial supervision (in addition to the self-interest of the parties) was the sole regulatory measure used in reorganizations and readjustments. An arrangement under Chapter XI is essentially merely a composition, rather than a complete reorganization and readjustment of interests in a corporation. There seems no reason for the courts to require more than judicial supervision when Congress required no more.

II. THE SECURITIES AND EXCHANGE COMMISSION HAS NO RIGHT TO INTERVENE IN A PROCEEDING UNDER CHAPTER XI, EVEN WITH THE PERMISSION OF THE COURT.

The Commission has urged that it should have been permitted to intervene in the proceedings below, and that the order of the Circuit Court of Appeals denying it the right to do so was of such public importance that the matter should be reviewed by this Court.

For the reasons pointed out on pages 12-14 of this brief, this question seems of no present significance. Accordingly, the Debtor will confine its argument on this point to a very brief statement.

A. The Commission is a statutory body with limited authority, and no statute authorizes the Commission to participate in a Chapter XI proceeding.

It is an established principle that governmental agencies created by statute have no authority except such as is specifically granted them by statute.[5] *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643 (1931); *Davis*

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[5] Mr. Justice Douglas, when Chairman of the Securities and Exchange Commission stated, "The administrative agency has no powers but the powers granted in the statute." (Address made October 26, 1938, printed in *Report of the Eighth Annual New York Herald Tribune Forum on Current Problems.*)

v. *Rochester Can Company,* 220 A. D. 487 (1927), affirmed without discussion as *Mellon* v. *Rochester Can Company,* 247 N. Y. 521 (1928); *Throop on Public Officers* (1892), Section 556.

Chapter XI makes no reference to the Commission, although Chapter X specifically grants a limited authority to the Commission. There is no other statute which either directly or impliedly gives the Commission authority to participate in a Chapter XI proceeding.

B. The Committee is not entitled to intervene either as of right or by permission within Rule 24 of the Federal Rules of Civil Procedure, and in any event may not intervene to impeach a decree already made.

We refer to the portion of the opinion of the court below (R. 423-424) which deals with right of intervention, and submit that the Court was correct in its reasoning and conclusion therein set forth. The cases cited by the Commission involve either property interests or an express statutory authority or no intervention at all.

III. THE SECURITIES AND EXCHANGE COMMISSION HAS NO STATUS TO APPEAL FROM THE ORDERS OF THE DISTRICT COURT.

As in the intervention question raised by petitioner, the Debtor believes that the question of appeal does not warrant review by this Court on certiorari. The Debtor's very brief argument follows.

A. Chapter XI does not authorize such an appeal and Chapter X expressly denies it in an analogous situation.

Section 208 of the Bankruptcy Act (Chapter X) expressly provides that the Commission shall have no right of appeal from orders of the District Court. If the Commission, which has affirmative functions to perform in

Chapter X, cannot appeal from Chapter X orders, it would seem strange indeed to permit appeals in Chapter XI, where the Commission is not even mentioned. Furthermore, since the Commission may not, under Section 208, appeal from an order denying a Chapter X petition on the ground that the remedy under Chapter XI is adequate, why should it be permitted to appeal from an original order approving the filing of and adequacy of a Chapter XI petition?

B. The Commission is not a proper party to appeal within Sections 24 and 25 of the Bankruptcy Act or within general principles requiring appellant to have an interest in the proceeding.

For its amplification of this argument Debtor merely refers to Sections 316, 24 and 25 of the Bankruptcy Act and to the opinion of the court below (R. 425) that the Commission's appeals "should be dismissed because the Commission is not aggrieved by the orders appealed from; it has no interest that is affected by the litigation." If the proceeding is valid the Commission concededly has no interest therein; if invalid, the proceeding is a nullity.

IV. NO REASONS OF PUBLIC INTEREST REQUIRE THIS COURT TO REVIEW THE ACTION OF THE COURT BELOW.

For the purpose of considering whether this Court should grant the petition for certiorari, the decision of the Circuit Court of Appeals should be subdivided into (1) its holding on the substantive question of whether the District Court could assume jurisdiction of a Chapter XI proceeding instituted by a corporation with publicly held securities, and (2) its holdings on the procedural questions of intervention and appeal.

A. The procedural questions of intervention and appeal are academic at this time, inasmuch as the Commission has already achieved its purpose of having the substantive jurisdictional question considered on appeal.

It seems clear that the holdings on the procedural points are not, in and of themselves, of sufficient public importance and interest to warrant review on certiorari. The Commission's motion for leave to intervene was admittedly solely for the purpose of moving the court (a) to dismiss the Debtor's petition, (b) to deny confirmation of the Debtor's arrangement, and (c) to dismiss the proceeding (R. 133). The Commission made a motion (R. 145) covering the matters set forth in its petition for leave to intervene, and the court expressly considered the matters and made its rulings thereon (R. 149). Accordingly, so far as the District Court was concerned, the Commission completely achieved its purpose in intervening, namely to challenge jurisdiction. Furthermore, on appeal, even though the Circuit Court dismissed the Commission's appeals, it expressly considered and ruled upon the substantive question of jurisdiction. The fact that the Circuit Court reversed the District Court's order granting leave to intervene was immaterial, since in practical result, all purpose of intervention, namely, to have an authoritative adjudication of the substantive issue, had already been achieved.

B. The substantive question depends upon the construction of a statute admittedly unambiguous in language, and the court below decided the question in accordance with general principles of statutory construction frequently approved by this Court.

The substantive question involved, and the only question which, in the opinion of the Debtor, could conceivably justify review by this Court, is the question of whether the District Court should have denied the Debtor the remedy

of Chapter XI solely because its securities are held by the public.

The Commission admits that the court below, in holding that the District Court properly assumed jurisdiction of the proceeding, read the statute with literal exactness (Petition, p. 9). As shown above, the statute was not only unambiguous but reasonable. Under these circumstances, the court below, in refusing to follow the intricate reasoning of the Commission, which was not justified by either the wording of the statute, or its historical derivation, or any statements in the Committee Reports, was merely following the authoritative line of decisions of this Court. Therefore, no review by certiorari seems warranted.

Conclusion

No sufficient public interest has been shown to warrant review of either the procedural or substantive questions considered below, and the petition of certiorari should be denied.

Dated: New York, N. Y., March 27, 1940.

Respectfully submitted,

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